

ESTATE OF PAUL LEON MESTETH

IBIA 86-17

Decided May 30, 1986

Appeal from an order determining heirs after rehearing entered by Administrative Law Judge S. N. Willett in Indian probate Nos. IP RC 17Z (REH), IP RC 11Z 83.

Affirmed.

1. Indian Probate: Children, Illegitimate: Generally

The failure of a man to acknowledge paternity of an illegitimate child to his family is not sufficient to prove he is not the father.

2. Indian Probate: Hearing: Generally

An individual who has been found to be an heir of an Indian decedent does not forfeit the right to participate in the estate by failing to attend a rehearing in which that heirship is not questioned.

APPEARANCES: Rosanna York Mesteth, pro se, and as guardian ad litem 1/ for Christopher Mesteth, a minor. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On November 29, 1985, the Board of Indian Appeals (Board) received a notice of appeal from Rosanna York Mesteth, for herself and as guardian ad litem for her minor son, Christopher Mesteth (appellants). Appellants seek review of a September 30, 1985, order determining heirs after rehearing issued in the estate of Paul Leon Mesteth (decedent) by Administrative Law Judge S. N. Willett. For the reasons discussed below, the Board affirms that order.

1/ Rosanna Mesteth objects to being called guardian ad litem. Guardian ad litem is a term of the highest respect in that it indicates a person who is acting as the legal guardian of the interests of an individual who is legally incapable of acting for himself. A guardian ad litem, or guardian during the proceeding, must exercise the utmost care to protect the interests of the other individual.

Background

Decedent, Oglala Sioux OSU 17379 of the Pine Ridge Indian Reservation, South Dakota, was born on April 15, 1943, and died intestate on January 1, 1983, at the age of 39. Because decedent owned Indian trust lands on the Pine Ridge and Rosebud Sioux Indian Reservations, a hearing to probate his Indian trust estate was held on October 25, 1983, before Administrative Law Judge Elmer T. Nitzschke.

Based on testimony and evidence presented at the hearing, Judge Nitzschke found that decedent had been living with Rosanna Mesteth in the State of California, but that California does not recognize common law marriages. Therefore, he concluded that decedent was not married at the time of his death.

Judge Nitzschke further found that decedent was survived by two children: Marie Paulette Mesteth and Christopher Mesteth. ^{2/} This finding was based on written acknowledgments of paternity signed by decedent on January 23, 1967, for Marie, and on August 23, 1977, for Christopher. Because of these findings, on December 16, 1983, Judge Nitzschke ordered distribution of decedent's Indian trust estate to Marie and Christopher.

Rosanna Mesteth timely petitioned for rehearing of this order, alleging she was decedent's wife by Indian custom marriage. Rehearing was granted, and the case was transferred to Judge Willett so that a hearing might be held at a location convenient for appellant. Before the hearing appellant filed a copy of a "Court Order Delayed Certificate of Registry of Marriage" entered pursuant to a March 29, 1984, order of the Superior Court of the State of California in and for the County of Los Angeles. Appellant's petition to the state court alleged she was married to decedent by Indian custom. The court order was entered on that ground.

Judge Willett held a prehearing conference and hearing on August 21, 1984. An order was issued on September 30, 1985, finding that Rosanna Mesteth was decedent's wife, and ordering her to share in the distribution of decedent's Indian trust estate.

Appellants' appeal from this order was received by the Board on November 29, 1985. Only appellants filed a brief on appeal.

Discussion and Conclusions

[1] Appellants raise several issues on appeal. They first argue that Marie should not participate in decedent's estate, apparently because decedent never mentioned her to them. The petition for rehearing did not question the finding that Marie was decedent's daughter. The issue, therefore, was not before Judge Willett during the rehearing. Despite this fact, the

^{2/} Marie Paulette Mesteth is the daughter of Leola Black Horse Goodman; Christopher Mesteth is the son of Rosanna Mesteth.

Board will address appellants' argument. The Board has previously held that the failure of a man to acknowledge paternity of an illegitimate child to his family is not proof that he is not the father. Estate of Harry M. Johnson, 10 IBIA 1 (1982). Here, decedent acknowledged paternity in writing according to South Dakota law. This acknowledgment was properly found sufficient to establish Marie's right to participate in decedent's estate.

[2] Appellants next argue that because Marie did not appear at the rehearing, she should not have a right to participate in the estate. As just mentioned, the petition for rehearing asked for a finding that Rosanna Mesteth was decedent's wife; Marie's participation in the distribution of the estate was not questioned. Even if under other circumstances Marie might have lost rights by her failure to appear at the rehearing, her right to participate in decedent's estate had already been determined and was not questioned. Her failure to appear at the rehearing does not affect her rights in decedent's estate.

Appellants object to the fact that Christopher had not been enrolled in the Oglala Sioux Tribe. The record does not disclose the reason for the delay in Christopher's enrollment. Judge Nitzschke's order shows his enrollment as pending. The record discloses that Christopher has now been enrolled, and gives his enrollment number as OSN-63180.

Appellants allege they should have received \$7,875 as decedent's share of certain judgment funds awarded to the Sioux Nation. Unless judgment funds have been distributed to an individual before death, and are therefore in his Individual Indian Money account, they are not part of the Indian trust probate estate. If appellants believe they are entitled to funds they have not received, they should present this information to the Superintendent of the Pine Ridge and/or Rosebud Agency, Bureau of Indian Affairs (BIA).

Finally, appellants appear to object to the valuation placed on the inventory of decedent's trust estate. This objection seems to indicate appellants do not understand co-ownership of Indian trust property. It thus appears they believe they are entitled to the value of the entire property, rather than the much lower value of decedent's fractionated interest in the property. For example, OS-24, a 160-acre allotment, is shown on the BIA inventory as valued at \$9,600. Decedent, however, owned only a 1/720 interest in that allotment, and his interest in OS-24 is valued at \$13.33. Because of the extremely high fractionation of the allotments in which decedent owned an interest, his estate was not valued highly. 3/

3/ Appellants perhaps also believe they should receive the amount specified in cash. Appellants' interests in decedent's Indian trust estate pass to them as interests in land. They are entitled to a proportionate share of any money the land produces. If they wish to sell their interest in the land to receive cash, they must seek a sale from the appropriate Agency Superintendent.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Willett's September 30, 1985, order is affirmed.

Jerry Muskrat
Administrative Judge

I concur:

Franklin D. Arness
Alternate Member